Office-Supreme Court, U.S.
FILED
DEC 3 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 561

E. NEWBOLD SMITH,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, GREATER PHILADELPHIA BRANCH AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE PETITION FOR CERTIORARI

RAYMOND K. DENWORTH, JR.,
1100 Philadelphia National Bank Bldg.,
Philadelphia 7, Pennsylvania,

PAUL BENDER,
3400 Chestnut Street,
Philadelphia 4, Pennsylvania,

JULIAN E. GOLDBERG,
2028 Delancey Street,
Philadelphia 3, Pennsylvania,

MELVIN L. WULF,
156 Fifth Avenue,
New York 10, New York,

Attorneys for the Amici.

INDEX

	PAGE
Interest of the *Amici*	1
Reasons for Granting the Writ	1
Conclusion	4

Table of Cases Cited

United States ex rel. Touhy v. Ragen, 340 U. S. 462	3, 3n
Jencks v. United States, 353 U. S. 657	4

Statute Cited

28 C. F. R. Part 16, 27 Fed. Reg. 744, January 16, 1962	3

In The

Supreme Court of the United States

October Term, 1963

No.

E. Newbold Smith,

Petitioner,

v.

Commonwealth of Pennsylvania,

Respondent.

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, GREATER PHILADELPHIA BRANCH AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE PETITION FOR CERTIORARI

Interest of the *Amici*

This brief is submitted with the consent of petitioner and respondent. The American Civil Liberties Union, Greater Philadelphia Branch, participated in an earlier stage of this case by submitting a petition for leave to file a brief and present oral argument on petitioner's motion for reargument of this case in the Supreme Court of Pennsylvania. The interest of *amici* in this case relates to their regular concern that persons accused of crime receive a fair trial of all the issues involved. Because evidence in the possession of the United States was wrongfully withheld after demand was properly made for its disclosure, we believe petitioner was denied a fair trial and, therefore, due process of law.

Reasons for Granting the Writ

1. During the course of petitioner's trial he made a timely request in proper form under state law for the issuance of a subpoena *duces tecum* to obtain material, directly relevant to his defense, which was in the possession of the

Federal Bureau of Investigation. The trial court refused to issue the subpoena, thus making the relevant material unavailable to petitioner. This refusal and petitioner's conviction have been affirmed by the Supreme Court of Pennsylvania.

In his petition for a writ of certiorari petitioner argues that the State thus violated a constitutional obligation under the Fourteenth Amendment to make its process reasonably available to a defendant in a criminal prosecution seeking material to enable him to establish his defense at trial. We support petitioner's contention that no sufficient reason existed for the refusal of the state courts to issue the subpoena in this case and, therefore, fully support petitioner's argument that the effect of the judgment below was unconstitutionally to deprive petitioner of his liberty. The petition for a writ of certiorari should be granted to correct this deprivation of important constitutional rights.

2. However, the Court may dispose of the present case without reaching the broad constitutional question of the extent to which state courts must afford criminal defendants compulsory process in aid of their defense, because in this case denial of the subpoena was based in the first instance upon a misapprehension of federal law. There is every indication that, but for this misapprehension, the subpoena would have been granted by the state courts in due course of Pennsylvania law.

The decisions below rest upon an assumption that the United States, through its local United State Attorney, has properly asserted a privilege in this case not to make the desired material in its possession available to the petitioner.* This assumption that a federal privilege has been

---

* The trial judge's assumption that a federal privilege had been claimed appears clearly in his opinion denying petitioner's motion for a new trial (R. 377a). The Supreme Court of Pennsylvania stated in its opinion that "it was the F.B.I. and not the Commonwealth which denied appellant access to the information in question." 412 Pa. 1, 4.

claimed is erroneous. Under the Department of Justice Regulation applicable at the time of petitioner's trial,* as construed in *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462, only the Attorney General of the United States may decide whether or not to claim a federal privilege not to produce material in the possession of the Department of Justice in response to a state subpoena. The record does not show that the Attorney General has made such a decision in this case. The local United States Attorney, upon whose statement the courts below rested their conclusion that a federal privilege had been raised, had no independent authority either to claim or to waive federal privilege. The federal agent in possession of documents, although immune from state-court contempt under the *Touhy* decision where his refusal to produce is pursuant to a valid departmental "house-keeping" regulation, has no authority under that case to decide affirmatively to claim federal privilege. The rule that the privilege may only be claimed by a decision of the Attorney General is incorporated in the present Regulation of the Department of Justice, which was promulgated shortly after petitioner's trial (28 C. F. R. Part 16, 27 Fed. Reg. 774, January 16, 1962). It states that, under the *Touhy* decision, when a request for material in the Department's possession is made, the local United States Attorney is only to request time "within which to refer the subpoena or order to the Attorney General" and is to refuse to produce requested material only "until instructions from the Attorney General have been received."

Thus the assumption by the courts below that a Federal privilege had been claimed here was erroneous and the decisions denying petitioner a subpoena flowed directly from

---

* Department of Justice Order No. 3229, May 2, 1946, 11 Fed. Reg. 4920, as supplemented by Supplement 2 to that Order, dated June 6, 1947. The Order and the Supplement are reproduced in Appendix D to petitioner's brief and in footnote 1 to the Court's opinion in *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462, 463-464.

that error. Federal law contemplated that the state trial court would issue the subpoena in this case thus calling upon the Attorney General to decide whether or not to invoke privilege. By erroneously assuming that a privilege had already been claimed, the state courts below denied the subpoena, and the Attorney General was never called upon to decide—and never did decide—whether or not to claim privilege. Although the courts below might have refused to issue a subpoena in this case even had they correctly concluded that the United States had claimed no privilege, in all probability the requested subpoena would in fact have issued. The state Supreme Court's opinion gives no reason, other than the supposed claim of federal privilege, for refusing the subpoena. The opinion further states the Court's adherence, as a matter of state law, to the rule of *Jencks* v. *United States*, 353 U. S. 657, showing that the state court would have ordered production in this case had the material been in possession of the state government, questions of federal privilege thereby being absent. 412 Pa. 1, 4. In addition, had the state subpoena issued, in all probability no federal privilege would have been claimed by the Attorney General. On the facts of this case, it does not seem possible that the interests of the federal government could have been affected adversely by the disclosure of the content of interviews with two private eye-witnesses to a roadside incident which did not in any way involve the federal government or its agents. In these circumstances, a claim of privilege by the federal government would be of very questionable validity, an issue left open in the *Touhy* decision.

Conclusion

We respectfully submit that it would be appropriate to dispose of this petition by vacating the decisions below in light of their erroneous conclusions that a federal privilege has been claimed in this case and by remanding the question

of the availability of state process in light of the facts (1) that a federal privilege had not been authoritatively claimed, and (2) that federal law contemplates a procedure under which the state should issue its subpoena before an authoritative claim of federal privilege will be made.

Respectfully submitted,

RAYMOND K. DENWORTH, JR.,
1100 Philadelphia National Bank Bldg.,
Philadelphia 7, Pennsylvania,

PAUL BENDER,
3400 Chestnut Street,
Philadelphia 4, Pennsylvania,

JULIAN E. GOLDBERG,
2028 Delancey Street,
Philadelphia 3, Pennsylvania,

MELVIN L. WULF,
156 Fifth Avenue,
New York 10, New York,

Attorneys for the Amici.

November, 1963.